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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAULA SKERSTON, Plaintiff and Appellant, v. LINDA SHEEHAN et al., Defendants and Respondents.	G045401 (Super. Ct. No. 30-2010-00413685) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Andrew P. Banks, Judge. Affirmed with instructions.

Paula Skerston, in pro. per., for Plaintiff and Appellant.

Robert Newman for Defendants and Respondents.

INTRODUCTION

This is appellant Paula Skerston's third trip to the Court of Appeal to protest a restraining order issued against her in 2007, and in favor of respondent Linda Sheehan.[1] In October 2010, Skerston, an attorney, filed a complaint against Sheehan and her attorney, Robert Newman, purportedly based on the Tom Bane Civil Rights Act, Civil Code section 52.1.[2] Actually, the complaint was based on Sheehan's restraining order and on allegations regarding Newman's activities while representing various clients, including Sheehan, in cases against Skerston.

The defendants filed an anti-SLAPP motion, which the trial court granted. The trial court found that the acts upon which Skerston based her complaint were all acts in furtherance of Sheehan's and Newman's rights of petition or free speech, and Skerston had not shown a probability of prevailing. The court dismissed the complaint with prejudice, and Skerston appeals.

We affirm. The complaint clearly implicates Sheehan's and Newman's rights of petition. Because of the absolute privilege afforded to litigants by Civil Code section 47, Skerston cannot possibly prevail on her claims against either Sheehan or Newman. The statements made in the course of the litigation are absolutely privileged. The act of applying for a restraining order itself is protected by the constitutional right to petition the courts and cannot be a basis for a lawsuit except one for malicious prosecution. This remedy is unavailable to Skerston because the restraining order

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[1] Appeal number one was from the restraining order itself. (*Sheehan v. Skerston* (Dec. 3, 2008, G039592) [nonpub. opn.].) We issued an opinion affirming the order on December 3, 2008. Skerston then sought to reopen the case on grounds of extrinsic fraud. The trial court denied this motion as untimely. We affirmed that order on July 25, 2011. (*Sheehan v. Skerston* (July 25, 2011, G044539) [nonpub. opn.].)

[2] Civil Code section 52.1, subdivision (b), provides: "Any individual whose exercise or enjoyment of any right secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a) [i.e., by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion], may institute and prosecute in his or her own name, and on his or her own behalf a civil action for damages . . ., injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured."

process did not terminate in her favor. This should therefore be the last of the appeals by Skerston regarding the Sheehan restraining order.

FACTS[3]

Skerston and Sheehan have been at odds at least since 2006, when Sheehan obtained a stipulated restraining order against Skerston. After the order expired in January 2007, Sheehan obtained another one, in October 2007, for three years, which Skerston contested. Attorney Newman represented Sheehan in the restraining order proceeding. Pursuant to Code of Civil Procedure section 527.6, Skerston was ordered to stay away from Sheehan, her home, her workplace, and her car and not to do the other bad acts listed in the statute. Skerston appealed from the restraining order, and we affirmed.

On October 4, 2010, just as the second restraining order was about to expire, Skerston filed a complaint against Sheehan, Newman, and Newman's professional corporation alleging violations of the Tom Bane Civil Rights Act. In a nutshell, the complaint alleged that Sheehan had "intimidated" Skerston by seeking and obtaining a restraining order against her, and Newman had "intimidated" her by helping Sheehan obtain the restraining order and by his representation of clients in other matters against Skerston. Both Sheehan and Newman were alleged to have submitted false evidence to the courts in connection with their proceedings against Skerston.

All three defendants moved to strike the complaint under Code of Civil Procedure section 425.16, the anti-SLAPP statute. The court granted the motion on January 28, 2011. Because of a paperwork mix-up, dismissal of the action was not entered until April 2011. This appeal followed.

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[3] We derive some of these facts from the previous opinions we have issued regarding the Sheehan restraining order.

DISCUSSION

The California Legislature enacted the anti-SLAPP statute to counteract "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) A court may order a cause of action "arising from any act" "in furtherance" of the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" to be stricken by means of this special motion. (Code Civ. Proc., § 425.16, subd. (b)(1).)[4] We review the order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)[5]

We use a two-part test to evaluate an anti-SLAPP motion. First, we determine whether the complaint or cause of action is "one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) As the Supreme Court has emphasized, "[T]he critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." (*Id*. at p. 89.) If the defendant satisfies the first part of the test, the burden shifts to the plaintiff to demonstrate a probability of prevailing. (*Id.* at p. 88.) Although the plaintiff does not have to prove its case at this juncture, it must present a prima facie case that could sustain a judgment if its evidence is believed. (*Id.* at pp. 88-89.)

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4 The statute defines "'an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" to include "any written or oral statement or writing made before a . . . judicial proceeding . . ." and "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." (Code Civ. Proc., § 425.16, subd. (e).)

5 In this case, we have *only* the order to review, in addition to the complaint itself. Skertston has not included any of the papers filed to support or oppose the motion in the clerk's transcript. The complaint is so obviously subject to dismissal under Code of Civil Procedure section 425.16, however, that we do not believe we need to augment the record in order to decide this case.

An order or judgment of the lower court is presumed correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) As appellant, Skerston has the obligation to point out where the trial court went astray.

This case is not even a close call. Every factual allegation of Skerston's complaint is directly tied to Sheehan's restraining order, whether applying for it or obtaining it. Every factual allegation against Sheehan thus describes an act "in furtherance" of Sheehan's right to petition the court for a restraining order against Skerston. Likewise, every factual allegation against Newman describes activities he engaged in while representing a client. All of these activities qualify for anti-SLAPP treatment under Code of Civil Procedure section 425.16. Respondents have therefore satisfied the first prong of the anti-SLAPP test.

Skerston has failed to carry her burden to show any probability of prevailing. The litigation privilege of Civil Code section 47 protects all of the activities alleged in Skerston's complaint. Regardless of the label on her cause of action, Skerston cannot sue Sheehan for suing her, and she cannot sue Newman for representing Sheehan or anyone else against her.

I. Allegations against Sheehan

Skerston's factual allegations against Sheehan are as follows: After Skerston filed a small claims action against her, Sheehan falsified evidence in the small claims action. Upon prevailing in the small claims action, Sheehan applied for a restraining order, in which she made false accusations against Skerston. Sheehan obtained a three-year restraining order against Skerston. As a result of the restraining order, Skerston had to turn over her gun to the Fullerton police department.[6] The

[6] We should perhaps point out that no cause of action could be stated against Sheehan for violating Skerson's civil rights as a result of Skerston's having to turn her gun over to the police. An individual's constitutional right to bear arms is maintainable only against government action, not against other individuals. (See *Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 332-335 [constitutional protection against unreasonable search and seizure applies to state actors, not private individuals].) A person who steals someone's gun is perhaps committing a crime, but he is not violating the owner's civil rights, any more than a burglar looking for loot is violating the Fourth Amendment.

restraining order also prevented Skerston from filing lawsuits against Sheehan (although apparently not this lawsuit) and against her friends.[7]

Obviously, Skerston's allegations against Sheehan all describe protected petitioning conduct, namely, Sheehan's application for a restraining order and her success in getting one. The burden therefore shifts to Skerston to show a probability of prevailing on the merits. She cannot possibly do so.

The absolute privilege of Civil Code section 47, subdivision (b)(2), protects all statements made by Sheehan in connection with the restraining order, even if they were false. "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) A defendant cannot be liable for *any* tort, except for malicious prosecution, on the basis of statements made during a judicial proceeding. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163-1165; see also *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1132.)

Sheehan's right to apply for the restraining order itself is protected by her right to petition for redress of grievances and cannot form the basis of a cause of action,

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[7] Although Skerston did not include a copy of Sheehan's restraining order in the record, she appears to allege that Sheehan obtained it pursuant to Code of Civil Procedure section 527.6. That section permits a court to issue an order "enjoining a party from harassing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, abusing, telephoning . . . destroying personal property, contacting, either directly or indirectly, . . . or coming within a specified distance of, or disturbing the peace of the petitioner." (*Id.*, subd. (b)(1)(6)(A).) It does not enjoin filing a lawsuit. It is not credible that Skerston, who purports to be an attorney, could reasonably believe the restraining order prevented her from suing Sheehan if a valid reason to do so arose.

other than for malicious prosecution. (*Matossian v. Fahmie* (1980) 101 Cal.App.3d 128, 135.) The court properly granted the anti-SLAPP motion as to Sheehan.[8]

II. Allegations against Newman

Against Newman, Skerston alleges as follows: In April of 2006, Skerston was representing a client; Newman represented the opposing party. He told her that he wanted to "get rid of her" as opposing counsel and informed the judge hearing the case that he might file a motion to "recuse" her from the case. Newman obtained and submitted false and unflattering declarations about Skerston to the court. He also obtained and submitted to the court photographs of Skerston, with the intention of portraying her as a stalker.

In August 2006, Newman represented a client (not Sheehan) who applied for a restraining order against Skerston. He also represented Sheehan in her first application for a restraining order against Skerston and submitted false declarations to support the application. Newman defended the Animal Abuse Prevention Agency when Skerston sued it in small claims court, by attacking her credibility. He also defended Sheehan in the small claims action Skerston filed against her, again by attacking Skerston's credibility and by claiming she was harassing people.

Newman represented Sheehan in the application for the second restraining order, using false information. The court issued the restraining order on October 23, 2007. Newman then told Skerston that the order would be dismissed if Skerston agreed not to take on any clients who wanted to sue Sheehan and not to sue her, either on behalf of clients or on Skerston's own behalf.

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[8] The trial court took a different tack in this portion of its anti-SLAPP analysis. The court held Skerston could not prevail on her cause of action because she had not alleged "any actions or statement by moving parties which constituted violence or threat of violence, which is required to support a violation of the Bane Act." Skerston argues on appeal that a Bane Act cause of action does not require allegations of violence or threat of violence. We need not decide this issue; the litigation privilege alone renders Skerston's Bane Act cause of action untenable.

Newman's status differs from Sheehan's because he was not a party to any of the actions or proceedings upon which Skerston bases her complaint. Instead, he became involved because he was representing clients who were opposing Skerston in these actions. His personal right to petition the courts for redress is therefore not at issue. Nevertheless, the anti-SLAPP statute covers attorneys who are being sued because of statements "'made in connection with an issue under consideration or review by a . . . judicial body' within the meaning of [Code of Civil Procedure] section 425.16, subdivision (e)(2)." (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420; see also *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [section 425.16 applies to "qualifying acts committed by attorneys in representing clients in litigation"].) All of the statements and conduct Skerston alleged against Newman fall into this category. The burden therefore shifts to her to show probability of prevailing on the merits. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 88.)

Skerston has no greater chance of prevailing against Newman than she has against Sheehan, which is to say, none at all. The litigation privilege of Civil Code section 47, subdivision (b)(2), protects not only the parties but also "other participants" in judicial proceedings, such as attorneys. (*Silberg v. Anderson, supra,* 50 Cal.3d at pp. 212, 214.) The statements Newman made and documents he submitted in connection with court proceedings, even if they were false as Skerston alleged, are privileged. (See

Olsen v. Harbison (2010) 191 Cal.App.4th 325, 332.) The court properly granted the anti-SLAPP motion as to Newman and his professional corporation.[9]

DISPOSITION

The order dismissing the complaint with prejudice under Code of Civil Procedure section 425.16 is affirmed. Respondents are to recover their costs on appeal.

The order granting the anti-SLAPP motion denied the moving parties' request for "fees in connection with the special motion to strike . . . without prejudice." As the appeal has now been decided, the court shall rule on the request for attorney fees under Civil Procedure Code section 425.16, subdivision (c)(1).

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.

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[9] Skerston claims in her reply brief that Newman's professional corporation is suspended. She argues that she should have been allowed to take the corporation's default, since a suspended corporation cannot defend itself. There are a few problems with this argument. First, it was raised for the first time in a reply brief, and we ordinarily do not consider such new arguments. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) Second, there is no evidence to support it. If any evidence was included in the opposition to the anti-SLAPP motion, it is not to be found in the record before us, because none of the moving or opposing papers made it into the clerk's transcript. Finally, and most importantly, even if Skerston is correct about the corporation's status, and she could take its default, this would have no effect on the ultimate outcome. She would still have to prove up her case to obtain a default judgment, and "if the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in the plaintiff's favor cannot stand." (*Kim v. Westmoore Partners, Inc.* (2010) 201 Cal.App.4th 267, 282.) The court would have to evaluate Skerston's right to judgment in light of the litigation privilege even in the absence of an anti-SLAPP motion. The privilege effectively cancels out any possible cause of action the allegations of the complaint could support.